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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Administration of the)
North American Numbering Plan)
Carrier Identification Codes (CICs))

CC Docket No. 92-237

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

PETITION FOR RECONSIDERATION

America One Communications Inc. ("America One"), by its attorneys and pursuant to 47 C.F.R. § 1.429, hereby petitions the Federal Communications Commission ("FCC" or "Commission") to reconsider its order on reconsideration in the above-captioned proceeding.¹ Specifically, America One seeks reconsideration of the Commission's decision to extend the transition period for implementing four-digit carrier identification codes ("CICs") from January 1, 1998 until June 30, 1998,² thereby perpetuating a current dialing disparity favoring incumbent carriers.

Introduction

America One is a provider of "casual calling" telecommunications services. Casual calling services enable non-presubscribed end users to place calls over the networks of

¹ Administration of the North American Numbering Plan, Carrier Identification Codes (CICs), *Order on Reconsideration, Order on Application for Review, and Second Further Notice of Proposed Rulemaking*, CC Docket No. 92-237, FCC 97-386 (rel. Oct. 22, 1997) (*CICs Order on Reconsideration*).

² America One was not at liberty to file comments or reply comments to petitions for reconsideration of the *CICs Second Report and Order*, Administration of the North American Numbering Plan, Carrier Identification Codes (CICs), *Second Report and Order*, CC Docket No. 92-237, FCC 97-125 (rel. Apr. 11, 1997), (*CICs Second Report and Order*), because it had not yet publicly announced its plan to provide casual calling services.

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designated interexchange carriers by first dialing an access code that includes a carrier-specific CIC. As is explained herein, customers can only select America One's services by dialing a relatively inconvenient seven-digit carrier access code (*i.e.* 101XXXX) containing the four-digit America One CIC, because BellCore has ceased assigning the three-digit CICs required to permit traditional five-digit (*i.e.* 10XXX) access code calling. BellCore's refusal to assign three digit access codes to new carriers has conferred a significant and artificial competitive advantage in the casual calling market upon incumbent service providers. The FCC's decision to allow incumbent carriers to continue using three-digit CICs until June 30, 1998, despite the current unavailability of new three-digit CICs, perpetuates this competitive handicapping by regulatory fiat. The Commission's "about-face" will inflict significant harm on America One, and presumably on other new entrants that acted in reliance on the Commission's January 1, 1998 deadline. Indeed, the extension of the access code dialing disparity will retard the development of competition in the market for casual calling services in flat contradiction to the pro-competitive goals of the Telecommunications Act of 1996.³

Accordingly, America One hereby respectfully requests that the Commission reinstate the January 1, 1998 termination date for use of three-digit CICs. Alternatively, the Commission should at least provide assurance that the June 30, 1998 termination date -- already the third deadline announced in this proceeding -- will not be further extended under any foreseeable circumstance.

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); *See* Joint Explanatory Statement of the Committee of the Conference, H.R. Rep. No. 458, 104th Cong., 2d Sess. 113.

Statement of Interest

America One is a subsidiary of Capital One Financial Corporation ("Capital One"). As one of the nation's 10 largest issuers of MasterCard and VISA credit cards, Capital One has developed considerable expertise in direct marketing and certain information-based marketing strategies which it believes can be applied successfully in the telecommunications industry. America One initiated service in late 1995 as a reseller of wireless telecommunications services. After enjoying early success in that market segment, America One realized that its extensive experience in direct marketing and information processing matched-up perfectly with the skill-set required to establish and operate a casual calling business in the landline telecommunications market. After surveying the existing casual calling market, America One believed that it could provide consumers of casual calling services better service at lower prices than most incumbent providers of such services. As described herein, America One has recently begun to provide CIC code-based casual calling services and therefore has an interest in this proceeding.

Argument

I. THE FCC SHOULD REINSTATE THE JANUARY 1, 1998 TERMINATION DATE FOR USE OF THREE-DIGIT CICS.

Contrary to the intent of the Telecommunications Act to facilitate open and fair telecommunications competition, the FCC's *CIC Order on Reconsideration* creates a substantial artificial barrier to entry into the casual calling market. The FCC's decision harms new entrants by perpetuating current dialing disparities in the casual calling market a critical point in the development of the casual calling industry segment. It is axiomatic that dialing disparities

for equivalent services is inherently anticompetitive.⁴ The institution of universal "1+" dialing for interLATA⁵ and intraLATA⁶ direct dial services, and the implementation of 800 number portability,⁷ were motivated by that realization. Yet desirous new entrants in the casual calling market face just such a dilemma. Non-presubscribed consumers may direct calls to incumbent carriers by dialing five-digits (10XXX) which incorporate the carriers' three-digit CICs. However, due to the shortage of remaining three-digit CICs, BellCore has refused to assign three-digit CICs to America One and other new entrants. Instead, new entrants such as America One are saddled by BellCore with four-digit CICs, which necessitate the dialing of a seven-digit access code (101XXXX) by consumers to utilize their services.

America One's proprietary market research shows that it will be at a significant competitive disadvantage if it must enter the casual calling market with a seven-digit access code while established incumbents market a shorter, more convenient five-digit code. Facing the possibility of being frozen out of the casual calling market indefinitely, in early 1997 the company actively explored the possibility of acquiring an existing telecommunications service provider, primarily to obtain the use of its three-digit CIC and its customer base associated therewith. In the midst of this process, the FCC released its *CICs Second Report and Order*

⁴ See *Competition in the Interstate Interexchange Marketplace, Report and Order*, 6 FCC Rcd 5880, 5904 (1991) (concluding that number portability is an essential predicate to full competition).

⁵ See *United States v. AT&T*, 552 F. Supp. 131, 233 at app. B (A)(2)(iii) (D.C. Cir. 1982) (requiring each BOC to provide exchange access to every interexchange carrier through a uniform number of digits).

⁶ See 47 U.S.C. § 251(b)(3) (imposing on all LECs the "duty to provide dialing parity to competing providers of telephone service and telephone toll service.").

⁷ See *Provision of Access for 800 Service*, 6 FCC Rcd 5421, 5425-5427 (1991) (ordering full number portability for 800 services).

which established January 1, 1998 as the final date for use of three-digit CICs, and required the use of four-digit CICs by all carriers thereafter. Several months later, the Commission reaffirmed its decision by summarily rejecting an emergency motion for stay filed by VarTec Telecom.⁸ In reliance upon the Commission's adamant determination that all carriers would have to migrate to four-digit CICs by January 1, 1998, America One abandoned its plans to acquire another carrier, and moved forward with plans to roll-out a casual calling product based on its own four-digit CIC in Fall 1997. The company decided that it could tolerate a dialing disparity during its testing and start-up phase, *provided that* all providers of casual calling services would be placed on a level playing field as of January 1, 1998.

Armed with the Commission's promise to end the dialing disparity, America One proceeded to invest in and develop a four-digit CIC-based casual calling service. The company entered into network agreements, made billing arrangements and developed the requisite back-office systems. Perhaps most importantly, America One launched a costly direct mail marketing campaign asking end users to try its seven-digit access code, and began to actually provide casual calling services to the public.⁹ In addition, America One began preparation of a much larger scale roll-out of its product timed for mailing after January 1, 1998 when all casual calling service providers would have to migrate to the expanded CIC code. After all of this planning and investment made in detrimental reliance upon deadlines established in the FCC's

⁸ See *Administration of the North American Numbering Plan, Carrier Identification Codes (CICs), Order*, CC Docket No. 92-237, FCC 97-125 (rel. Jul. 18, 1997), app'n. for review pending ("*CICs Stay Order*").

⁹ Only one incumbent, to America One's knowledge, joined America One's effort to comply with the Commission's *CICs Second Report and Order* by transitioning to the use of a seven-digit access code.

CICs Second Report and Order, at the eleventh hour the Commission heeded the pleas of incumbent carriers to perpetuate their dialing advantage, and deferred implementation of its *CICs Second Report and Order* until June 30, 1998. While that decision may pacify certain incumbent carriers, it has derailed the plans of America One (and presumably other new entrants) to compete on an equal footing.

The Commission's surprising extension of the transition period has had two detrimental impacts on aspiring competitors such as America One. First, it has further delayed their ability to compete effectively with incumbent carriers. Incumbent carriers already enjoy a tremendous head start over new entrants in terms of name recognition and market share. By extending the deadline, the Commission has effectively insulated incumbents from competition by new entrants for an additional six month period, during which time incumbents can exploit their artificial head start to acquire a critical mass of customers. Once incumbents achieve such scale in this industry segment, the opportunity for robust competition will be significantly diminished. Accordingly, the six-month extension is far more important than the Commission may have realized.

Second, the inability of new entrants to rely on deadlines established by the Commission makes rational business planning by new entrants exceedingly difficult. As a cursory investigation of the casual calling industry segment would reveal, the preferred marketing vehicle for casual calling services is direct mail. Effective direct mail campaigns require substantial lead time. Thus, an understandable concern over whether the deadline will be deferred further is likely to cause new entrants to postpone their marketing plans indefinitely, and have a chilling effect on competitive entry in the casual calling market.

It is well-recognized that federal administrative agencies may not impose undue hardship by suddenly changing direction to the detriment of those who have reasonably relied on past policy.¹⁰ Although America One is sympathetic to the desire of incumbent carriers for time to reeducate their customers on the use of four-digit CICs, any inconvenience to incumbent carriers clearly is outweighed by the damage done to new entrants which must continue to suffer a sizeable dialing disadvantage. As the Commission itself has stated, "the public interest, and the pro-competitive policies underlying the Act. . . are best served by moving to use of four-digit CICs as soon as possible."¹¹ Simply put, the unacceptable anticompetitive effects of the dialing disparity, the damage to new carriers like America One that detrimentally relied on past Commission orders, and the discouragement of entry by new carriers far outweigh any potential difficulties of meeting the January 1, 1998 deadline for implementing four-digit CICs. Accordingly, the Commission should reverse its decision to extend the transition period and reinstate the January 1, 1998 termination date for use of three-digit CICs.

II. IF THE FCC NONETHELESS REAFFIRMS ITS DECISION, UNDER NO CIRCUMSTANCE SHOULD IT FURTHER EXTEND THE JUNE 30, 1998 DEADLINE.

The uncertainty caused by repeated extensions of the deadline for retirement of three-digit CICs is extremely damaging to the development of competition in the casual calling market. If the Commission declines to reinstate the January 1, 1998 termination date as requested in this petition, it should at least provide assurance that the June 30, 1998 deadline

¹⁰ *Cities of Anaheim, Riverside, Banning, Colton and Azusa v. FERC*, 723 F.2d 656, 659 (9th Cir. 1984), citing *Ruangswang v. INS*, 591 F.2d 39 (9th Cir. 1978).

¹¹ *CICs Order on Reconsideration* at ¶ 25. See also *Administration of the North American Numbering Plan, Carrier Identification Codes (CICs), Order*, CC Docket No. 92-237, FCC 97-125 (rel. Jul. 18, 1997), app'n. for review pending ("*CICs Stay Order*").

will not be further extended. Yet another extension would constitute the fourth termination date announced by the FCC in this proceeding, and could well force America One or other new entrants to abandon the casual calling market entirely.

The harm to competition caused by uncertainty becomes more serious with each passing month that the dialing disparity is allowed to continue. Uncertainty compounds the anticompetitive effects caused by the dialing disparity, because new entrants are unable to make informed decisions about effective market entry strategies. The date upon which all carriers must use CICs of equal length is a central fact upon which new entrants must base their market entry strategies. This is particularly true of new entrants such as America One that rely on marketing through direct mailings, which require at least three months of production lead time and a significant upfront investment. Thus, uncertainty prevents new competitors from implementing their plans to use four-digit CICs, because they cannot accurately predict how long the competitive advantage enjoyed by incumbents using three-digit CICs will continue.

Promotion of the development of competition in the casual calling market, consistent with the central goals of the Telecommunications Act, depends largely upon the Commission providing the regulatory certainty that new market entrants require in order to formulate effective and economically efficient market entry strategies. As the Commission has recognized, the public interest is served by providing a reasonable level of regulatory certainty.¹² Consequently, should it decline to reinstate the January 1, 1998 termination date,

¹² See, e.g., Implementation of Section 303 of the Telecommunications Act of 1996, (acknowledging a strong public interest in establishing a level of certainty in business plans); Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Report and Order*, 10 FCC Rcd 4695, 4766 (1995) (finding that "[a]doption of these rules promotes the public interest by removing this cloud of

(continued...)

the FCC at a minimum should provide explicit assurance that the June 30, 1998 termination date for use of three-digit CICs will not be further extended.

Conclusion

For the foregoing reasons, America One respectfully requests that the Commission reconsider its decision and reinstate the January 1, 1998 termination date for use of three-digit CICs. Alternatively, the FCC should provide explicit assurance that the June 30, 1998 deadline will not be further extended.

Respectfully submitted,

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Date: November 20, 1997

¹²(...continued)

regulatory uncertainty and allowing these service providers to move ahead."); Policies and Rules Concerning Children's Television Programming Revision of Programming Policies for Television Broadcast Stations, *Report and Order*, 11 FCC Rcd 10660, 10723 (1996) (finding that adoption of the rules at issue would "serve the public interest by providing a reasonable degree of certainty"); Expanded Interconnection with Local Telephone Company Facilities, *Memorandum Opinion and Order*, 8 FCC Rcd 4133, 4136 (1993) (concluding "that the public interest favors regulatory certainty so that interconnectors can make business decisions").